90-884

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

GAHLON W. KUNKLE, et al.,

PETITIONERS

v

FULTON COUNTY BOARD OF COMMISSIONERS
et al.,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. SIXTH CIRCUIT COURT OF APPEALS

WILLIAM P. HICKEY
1970 CR 32
Helena, OH 43435
(419) 457-5525

COUNSEL FOR PETITIONERS

QUESTIONS PRESENTED

1.) Relative to Appellate Rule 3, what do the words mean:

> "so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with",

as used by the Advisory Committee Notes on the 1979 amendment to appellate Rule 3?

Torres v Oakland Scavenger Co. et al 487 U.S. 317 states:

> "a court may ... find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires. See e. g. Houston v Lack pg. 266."

Minority Employees of the Tennessee Department of Employment Security, Inc. v State of Tennessee 901 F 2d 1327 (6th Circuit) states that Torres requires every appellant to be listed.

National Center for Immigrant's Rights Inc. v Immigration &

Naturalization Service et al 892 F 2d 814 (9th Circuit) holds that:

"Individual names of appealing parties need not be listed in body of notice of appeal in instances in which generic term, such as "plaintiffs" or "defendants", adequately identifies them".

This later rule is also followed in the 5th Circuit.

2.) Did the Court of Appeals comit error in dismissing appellants, sua sponte and prematurely, without an opportunity to be heard on the court's rule enunciated in Minority Employees of The Tennessee Department of Employment Security Inc. v State of Tennessee Dept. of Employment Securities et al. 901 F 2d 1327, and without granting a preliminary injunction pending that hearing?

PARTIES TO THE PROCEEDING

Plaintiffs - Petitioners

Gahlon W. Kunkle;

Mrs. Gahlon Kunkle;

Eldin Max Borton;

Randy Merillat;

North West Ohio Rivers Council;

William P. Hickey.

Defendants - Respondents

Fulton County Board of Commissioners;

Sandusky County Commissioners;

Sandusky County Auditor;

Sandusky County Treasurer;

Joseph J. Sommer, Director of
Ohio Department of Natural Resources;

Tax Commissioner, State of Ohio.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

No.

GAHLON W. KUNKLE, et al.,

PETITIONERS

v

FULTON COUNTY BOARD OF COMMISSIONERS et al.,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. SIXTH CIRCUIT COURT OF APPEALS

The Petitioners, Gahlon W. Kunkle, Mrs. Gahlon Kunkle, Eldin Max Borton, Randy Merillat, North West Ohio Rivers Council, & William P. Hickey respectfully pray that a writ of certiorari issue to review the order and opinion of the U.S. Sixth Circuit Court of Appeals enter on September 7, 1990.

OPINIONS BELOW

The Order of the U.S Sixth Circuit Court of Appeals entered September 7, 1990; and the judgment of the District Court are set out in the Appendix hereto. All decisions are unreported.

JURISDICTION

This action draws into question the meaning of Rule 3 of the Rules of Appellate Procedure, and what is required to comply therewith.

The juridiction of the U.S. Supreme Court to review this decision of the U.S. Court of Appeals is conferred by 28 U.S.C. Section 1254 (1)

Further, there is the underlying question of whether or not Ohio Statutes R.C. 6131 through 6141 and R.C. 5713.30 through 5713.37 are constitutional.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws."

STATUTES INVOLVED

28 USC 1331

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 USC 1341

"The district courts shall not enjoin, suspend or restrain the asessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Ohio R.C. 2723.05

"If, by judgmentor final order of any court of competent jurisdiction in this state, in any action not pending on appeal it is determined that any tax or assesssment or part thereof was illegal and such collection or payment of such tax or assessment, then at the time of such judgment or order unexpended and in the possession of the officer collecting the same shall be refunded to the person paying such tax or assessment by the officer having the same in his possession."

R.C. 5703.38

"No injunction shall issue suspending or staying any order, determination, or direction of the department of taxation or any action of the treasurer of state or attorney general required by law to be taken in pursuance of any such order, determination, or direction. This section does not affect any right or defense in any action to collect any tax or penalty."

R.C. 6131.01F (partial)

"Providing an outlet for the accelerated runoff from artificial drainage whenever the stream, watercourse, channel, or ditch under improvement is called upon to discharge functions for which it was not designed by nature; it being the legislative intent that uplands that have been removed from their natural state by deforestation, cultivation artifical drainage, urban development, or other manmade causes shall be considered as benefited by an improvement required to dispose of the accelerated flow of water from the uplands."

R.C. 6131.02

"When the board of county commissioners, at a regular or called session, upon the filing of a petition as provided in sections 6131.01 to 6131.64 of the Revised Code, finds that the granting of the petition and the construction of an improvement is necessary for disposal or removal of surplus water, for controlled drainage of any land, for irrigation, for storage of water to regulate stream flow or to prevent the overflow of any land in the county ... the board of county commissioners may locate, construct, reconstruct, straighten, deepen, widen, alter, box, tile, fill, wall, dam, arch, change the course, location, or terminus of, straighten, deepen, remove obstructions from, or widen any ditch, drain,

watercourse, floodway, river, creek, or run, ...".

R.C. 6131.04 (partial)

"Any owner may file a petition with the clerk of the board of county commissioners of the county in which is located a part of the land that is averred to be benefited by the construction of a proposed improvement."

R.C. 6131.25

"Any interested owner may appeal to the court of common pleas from a final order made by the board of county commissioners, as provided in sections 6131.01 to 6131.64, inclusive, of the Revised Code, and may appeal any one or more of the following questions:
(A) Is the improvement necessary?
(B) Will the improvement be conducive to the public welfare?
(C) Is the cost of the improvement greater than the benefits conferred?
(D) Is the route, termini, or the mode of construction the best to accomplish the purpose of the improvement?
(E) Are the assessments levied according to benefits?
(F) Is the award for compensation or damages just?...".

STATEMENT OF THE CASE

This case arises out of an order given sua sponte dismissing certain appellants without an opportunity to be heard, and in response to a motion for a temporary injunction.

In the early 1980's, Plaintiff Hickey's taxes went up 300% and so he investigated what the county was doing. Investigation showed there were two reasons:

1.) He had not signed a contract with the State, and paid a $25 fee to have his land continued to be taxed as farm land under the uniform CAUV Statutes (Current Agricultural Use Value), when in fact its highest and best use was farm land.

2.) He was being specially assessed for deepening a Creek that was more than 2 miles away from his property.

Plaintiff Hickey filed two suits

in Sandusky County Court. The first suit charged that the CAUV statutes and regulations thereunder were unconstitutional for requiring a fee and requiring a contract before his land could be properly taxed according to the uniform mode. The second suit, charged that Ohio R.C. 6131 through 6141 (The Ditch Laws) were unconstitutional for a number of reasons including: lack of any benefits whatsoever, lack or approval of the people specially assessed, use of the Ditch Laws on Rivers and Creeks (property, power over which, had not been delegated to the Ohio Legislature by the Ohio Constitution), and destruction of Ohio's Creeks and Rivers as a source of the people's drinking water.

In the first suit, the county judge stated that the constitutional challenge

to CAUV was not "well taken", but that she would hear the case under CAUV. Plaintiff Hickey hired a local attorney to help during the trial. Immediately a second pretrial was called. Plaintiff Hickey was refused entrance to the judge's chamber this time. When the local attorney came out of the judge's chamber, the local attorney said he had to get out of the case. He wouldn't say what the judge and prosecuting attorney had told him, but he said: "I'll tell you this, there isn't an attorney in the County that will take your case."

In the second case, the County Judge said that the constitutional issues (State and Federal) were not "well taken". After a big delay there was a trial on what the benefits were from deepening a Creek 2 to 10 miles away. Dr. Schwab from Ohio State University

proved that there were no benefits to drainage beyond approximately 1000 feet from the deepening project. The trial occured April 23, 1988 and the judge to this day has never given a decision.

Plaintiff Hickey filed suit in Federal Court claiming that the CAUV Statutes and Regulations, and the Ditch Laws violated the U.S. Constitution under 28 USC 1331. Plaintiff Hickey's case was consolidated with Gahlon Kunkle et al because the challenge to the Ditch Laws was the same.

The Ohio Attorney General asked for dismissal under 28 USC 1341 (The Anti - Injunction Act.) Plaintiffs argued the case of Miami Herald v City of Hallandale 734 F. 2d 666; and the case of Garrett v Bamford 538 F. 2d 63. The U.S. District Court agreed with the Ohio Attorney General and

dismissed the case without treating the propositions of law laid down in the Miami Herald case and the case of Garrett v Bamford.

Further, the district court held that Ohio RC 6131.25 provided a "plain, speedy and efficient" means of hearing a constitutional attack on the ditch laws. This later holding ignores the fact that RC 6131.25 spells out only six issues which can be considered, and a constitutional attack on the ditch laws themselves is not included.

Further, it ignores the fact that RC 5703.38 prevents an injunction in Ohio, and R.C. 2723.05 effectively prevents the recoupment of an illegal State tax once it is paid. The District Court also ignored the amendment effective Dec. 1, 1980 to 28 USC 1331 which removes concurrent jurisdiction, with state courts, of federal questions.

The District Court's decision was appealed to the Sixth Circuit Court of Appeals. After all briefs were filed, the County started a foreclosure action on Plaintiff Hickey's farmland. A motion for a preliminary injunction was filed in the Sixth Circuit Court of Appeals. The Court of Appeals, sua sponte, dismissed the motion for an injunction and gave an order dismissing the appeal as to all plaintiffs of the consolidated cases except Gahlon W. Kunkle. As authority for this drastic action, they cited Torres v Oakland Scavenger Co. 487 U.S. 312, and their own decision in Minority Employees of the Tennessee Department of Employment Security, Inc. v. State of Tennessee, Department of Employment Security, 901 F. 2d 1327.

A motion for reconsideration was filed pointing out that the Final

Judgment of the District Court had been copied verbatim - both as to the caption and the body of the Final Judgment. It was stated, that if the court of appeals found certain considerations lacking in the appeal, it was because the district court had not given a final judgment as to those considerations. A copy of the motion was returned stamped "dismissed" without comment.

DISCUSSION

The Ninth Circuit District Court that first encountered the facts of Torres v Oakland saw that where an attempt is made to individually recite the plaintiffs and one is left out, reasonable minds are put on notice that the omitted party intended not to appeal. The Supreme Court in Torres v Oakland agreed stating on page 316:

> "We do not dispute the important principle for which Foman stands- that the requirements of the rules of procedure should be liberally construed and that "mere technicalities" should not stand in the way of consideration of a case on its merits. Ibid. Thus, if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires. See, e.g., Houston v Lack 101 L Ed 2d 245, 108 S Ct 2379"

On page 318: the court said:

> "The specificity requirement of Rule 3(c) is met only by some

designation that gives fair notice of the specific individual or entity seeking to appeal.

A justice in a minority opinion stated:

> "By definition all rules of procedure are technicalities; sanction for failure to comply with them always prevents the court from deciding where justice lies in the particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases.

Another justice in a minority opinion stated:

> "After today's ruling, appellees will be able to capitalize on mere clerical errors and secure the dismissal of unnamed appellants no matter how meritorious the appellant's claims and no matter how obvious the appellant's intention to seek appellate review, and courts of appeals will be powerless to correct even the most manifest of resulting injustices."

History seems to have shown that the attempt to create an airtight rule has not created the fair and orderly process of justice that was hoped, but has proliferated appeals and created the most manifest of injustices.

It appears axiomatic that no rule of law that does not address the equities of a fact situtation, can, or will last!

The Sixth Circuit was obviously impressed by the minority opinion relative to the need of making a rule regardless of the equities, when they gave the opinion in Minority Employees of The Tennessee Department Of Employment Security, Inc. v State of Tennessee, Dept. of Employment Securities et al 901 F 2d 1327. In this later opinion the Sixth Circuit said that all plaintiffs must be individually stated either in the caption or in the body, and as authority there for they cited Torres v Oakland Scavanger.

Thereafter the Ninth Circuit Court of Appeals was again faced with a similar situation in National Center

For Immigrant's Rights, Inc. et al v Immigration & Naturalization Service, et al 892 F 2d 814 (1989) the court said at page 815:

> "The appellees, relying on Torres v. Oakland Scavenger Co. ... interpret Torres as standing for the proposition that under Rule 3(c) of the Federal Rules of Appellate Procedure the names of the parties appealing must be listed in the body of the notice of appeal. Failure to do so, argue the appellees, necessitates dismissal of the appeal. Torres, however, does not stand for such a broad nor exacting proposition."
>
> "We hold that Torres does not require that the individual names of the appealing parties be listed in instances in which a generic term, such as plaintiffs or defendants, adequately identifies them."
>
> "It is sufficiently clear from the body of the notice that all of the defendants are seeking to appeal. While their intentions might arguably have been clearer had the defendants used the article "the" in front of the word "defendants," the omission of the article does not require a different result from that reached by the Sixth Circuit. Defendants, in its normal usage, means all defendants

not just some. Had only some defendants intended to appeal, the proper term to be used in the body of the notice would have been "certain defendants." Alternatively, if only some defendants desired to appeal, those defendants could have identified themselves individually. As stated by the Advisory Committee Notes on the 1979 amendment, "so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with."

No case, can be decided in a vacuum- for all nature abhores a vacuum! What might otherwise appear to be a vacuum in the present instance is filled with: legislative intent, companion rules, and rules of parlimentary procedure that have long governed proceedings among men.

Rule 10 (a) of the Federal Rules of Civil Procedure states:

"In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each

side with an appropriate indication of other parties."

Rule 3 (c) of the Rules of Appellate Procedure states:

> "The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal." (Emphasis added)

Rule 19.6 of the Supreme Court Rules states:

> "All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court, unless the petitioner shall notify the Clerk of this Court in writing of petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the Clerk, with service on the other parties, that he has an interest in the petition. All parties other than petitioners shall be respondents,".

Robert's Rules of parlimentary procedure states that where the custom is different than the By Laws, the custom shall prevail.

These rules show an intent that rules should become more liberal and conform to custom where possible, as a case progresses through our Judicial System. In the conduct of affairs among men, custom should not be ignored- for if it is, havoc will surely result.

The case of Minority Employees of the Tennessee Department of Employment Security, Inc. v State of Tennessee, et al stands out like a sore thumb. It is not economical of the judiciary's time, nor of the litigants, nor of the whole justice system to dismiss a case after it gets to the appellate level. In the present instance, plaintiff has tried for over 6 years

to get a constitutional issue heard, and always he has been rebuffed by a "judge made rule" that is outside of the literal language of the published rules or statutes. There is no reason to believe that what happened, to plaintiffs here is unique. Rather it must be indicative of what is going on through out the courts of our nation.

If it is indicative how can it be stopped? We suggest that this is best accomplished by having the highest court of our land set a precedent wherein a statute or rule is never given an interpretation that is not supported by the literal language of the statute or the rule itself. In this respect, the sample form in Appellate Rule 3 is entirely misleading. It is the epitome of simplicity, and there is no indication of what is expected when multiple parties are

involved. One would assume that simplicity was the rule of the day, and no great elaboration was necessary.

In the present instance the caption and body of the Final Judgment of the District Court was copied verbatim in the Notice of Appeal. Appellant is now told that that language, when used by the court, is perfectly clear to let everyone know who the judgment is against. Appellant is then told, that when he uses the same language, it is not sufficient to let everyone know who is appealing. Equity ought to set this situation straight! (See England v Louisiana State Board of Medical Examiners et al. 375 U.S. 411).

There is nothing in the English Common Law System, and certainly nothing in the Roman System, that indicates that a litigant should be punished retroactively for doing something that

was decided to be wrong after he did the act complained of. Justice should give the litigant relief. (See England v Louisiana State Board supra) and should <u>further</u> indicate that the statute or rule should be changed to guide the public in the future, if only by dicta. To make a new and additional rule that is burried in the bowels of decided cases, <u>without changing the rule itself</u>, does not bring efficiency into our judicial system.

In addition, our system of justice would be greatly improved if the courts would refuse to give a ruling that is outside of the literal language being ruled on. If the courts took this approach, the makers of rules would fast change the language of the rule that is the heart of the problem, and thereby secure <u>"a fairer and more equitable process, which would enable</u>

far more justice to be done in the totality of cases", and without relying on a theory of questionable validity.

CONCLUSION

The Ninth Circuit, that gave us the Torres Case, now flatly states that Torres does not stand for the proposition that a notice of appeal must specifically name each and every appellant.

The Supreme Court in its Rules governing the petition for a writ of Certiori has come up with the most complete, equitable, and best reasoned approach to the whole matter. Having once reasoned out and decided this rule for itself, why shouldn't the same rule be adopted for all other courts of appeals? Why, in the center of the appeal system, should there

be a rule, which, as one Justice has stated, is intended to throw a lot of meritorious cases out of court, after a great deal of time and effort has been spent by a lot of people All this on the dubious theory that it is the best method of teaching the public. This theory, if it is motivating our justice system, needs reexamination. "That which is not just, can not be the Law!

Appellants propose the following ruling:

> Henceforth, any notice of appeal that is filed within the time restraints of Rule 4, and which does not indicate on its face that all of the parties which participated in the lower court do not wish to pursue the appeal, shall be deemed to comply with Appellate Rule 3(c) as to all parties. The Supreme Court views the Notes of the Advisory Committee as an attempt to bring the Appellate Rules in conformity with our Rule 19.6.

William P. Hecky

Certificate of Service

I certify that I am a member of the Bar of this Court representing the Petitioners herein and that three copies of the above petition for writ of certiorari to the Sixth Circuit Court of Appeals were served upon counsel for each of the respondents, by U.S. mail, first class postage prepaid, addressed to the following respectively: Thomas J. O'Connell, Assistant Attorney General, State Office Tower 26th Fl., 30 East Broad Street, Columbus, OH 43266-5414; Ronald Mayle, Sandusky County Courthouse, 100 N. Park Ave., Fremont, OH 43420; and Donald W. Theis, 1515 National Bank Bldg., Toledo, OH 43604; this 8th day of November, 1990.

William P. Hickey

Sept 9, 1990
Leonard Green

No. 90-3261

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Gahlon W. Kunkle, Plaintiff-Appellant, Mrs. Gahlon Kunkle; Eldin Max Borton; Randy Merillat; North West Ohio Rivers Council; William P. Hickey, Plaintiffs, v. Fulton County Board of Commissioners; Sandusky County Commissioners; Sandusky County Auditor; Sandusky County Treasurer; Joseph J. Sommer, Director of Ohio Department of Natural resources, Defendants-Appellees.	ORDER

BEFORE: KENNEDY and MILBURN, Circuit Judges; and PECK, Senior Circuit Judge.

In these consolidated actions, a notice of appeal was timely filed from the district court's order dismissing these cases which challenge certain Ohio statutes relating to special tax

assessments for ditch projects. One of the plaintiffs below, William P. Hickey, has filed herein a motion for injunction pending appeal to enjoin the tax (foreclosure) sale of his property which is scheduled to occur on September 13, 1990.

The district court dismissed the consolidated actions for lack of jurisdiction because the Tax Injunction Act, 28 U.S.C. 1341, prohibits district courts from enjoining, suspending, or restraining the assessment, levy, or collection of any tax; under state law where a plain, speedy, and efficient remedy may be had in the state courts. The district court concluded that there was such a remedy of which the plaintiffs had not availed themselves.

The timely notice of appeal puportedly filed in behalf of all the plaintiffs below was styled Gahlon

W. Kunkle, et al., Defendants. The body of the notice of appeal stated in relevant part, "Notice is hereby given that Gahlon W. Kunkle et. [sic] al., plaintiffs above named, hereby appeal . . . " Under Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), and Minority Employees of the Tennessee Department of Employment Security, Incorporated v. State of Tennessee, Department of Employment Security, 901 F. 2d 1327 (6th Cir. 1990) (en banc), the notice of appeal is defective in that it is not sufficient to confer jurisdiction in this court over any plaintiff-appellant other than Gahlon W. Kunkle. Accordingly, this court lacks jurisdiction over plaintiff William P. Hickey and the other plaintiffs named below in these consolidated actions.

It is therefore ORDERED that the

motion for injunction pending appeal is denied for lack of jurisdiction, and it is further ORDERED that the appeal is dismissed as to all plaintiffs other than Gahlon W. Kunkle.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

/s/ Leonard Green

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Filed
1990 Feb 23

Gahlon W. Kunkle,
Mrs. Gahlon Kunkle,
Eldin Borton,
Randy Merillat,
North West Ohio Rivers Council,
William P. Hickey,

Plaintiffs

vs.

Case No.
3:89CV7102

Fulton County Board
of Commissioners,
Sandusky County Commissioners,
Sandusky County Auditor,
Sandusky County Treasurer,
Joseph J. Sommers,
Director of the Ohio
Department of
Natural Resources.

Defendants

OPINION
AND ORDER

POTTER, J.:

Case No. 3:89CV7102 came to this Court by the filing of a complaint wherein plaintiffs seek declaratory and equitable relief. Plaintiffs ask the Court to do the following:

1. Issue a declaratory judgment that RC Chapters 6131 through 6141 are financed by special assessments which violate the Fourteenth Amendment to the United States

Constitution, as well as for each of the other reasons given above.

2. Issue a declaratory judgment that Project 2036 is Unconstitutional in that the total costs exceed the benefits to Plaintiffs, and a large share of the people in the watershed in violation of the Fourteenth Amendment to the United States Constitution.

3. Issue a declaratory judgment that any project which is to be financed by special assessments, violates the Fourteenth Amendment to the United States Constitution:

a.) when police powers of the State are not involved, and the project to be undertaken does not have the approval of a majority of the people to be specially assessed thereunder; or

b.) when police powers of the State are involved, and the project to be undertaken does not have the approval of the majority of the people for whom the police powers are to be exercised.

4. Permanently enjoin Defendants, jointly and severally, from approving areas of, and/or promoting the draining of overflow areas of, and/or channelization of Ohio's rivers and creeks without the approval of a majority of the citizens of Ohio whose source of drinking water is affected thereby.

5. Permanently enjoin Defendants, jointly and severally from the following: approving and/or promoting ditch projects to be paid for by special assessments, and which are not required under the police powers of the State, without

first obtaining the approval of a majority of the land owners who are to be specially assessed for the project; or approving and/or promoting ditch projects which are required under the police powers of the State without first obtaining the approval of a majority of the citizens of the state of Ohio which are directly affected by the project.

6. Allow Plaintiffs their costs, herein, including reasonable attorney's fees, and such other relief as may appear to the court to be just and equitable.

(Complaint, prayer for relief.)

Although the complaint has been prepared with a broad brush, the Court concludes that the gist of the complaint is that plaintiffs have been assessed for Ditch Project 2036 in Fulton County for which they allege that they will receive no benefit, that generally proper procedures were not followed in determining the assessment, and Ohio Rev. Code 6131-6142 are unconstitutional.

Plaintiff North West Ohio Rivers Council is a nonprofit corporation

which, it is alleged, has for its purpose the conservation of rivers and streams in Northwest Ohio and elsewhere. This statement adds nothing to the case. Thereafter, William P. Hickey, who is counsel in Case No. 3:89CV7102, filed the complaint in Case No. 3:89CV7251, wherein he is the sole plaintiff against the Sandusky County Commissioners, County Auditor, County Treasurer, Joseph J. Sommers, Director of ODNR, and the Auditor of the State. Plaintiff asks that this Court do the following:

1. Issue a declaratory judgement that RC Chapters 6131 through 6141 are Unconstitutional in that they are financed by special assessments which violate the Fourteenth Amendment to the United States Constitution, as well as for each of the other reasons given above.
2. Issue a declaratory judgment that the assessment procedure used by the Sandusky County Auditor is in violation of the 14th Amendment to the U.S. Constitution; and if properly based on the rules of the Auditor of the State of Ohio, then

his rules are unconstitutional; and if his rules are properly based on Ohio RC 5713.30 through 5713.38, then these statutes are unconstitutional.

3. Hold all special assessments past and present based on Ohio RC Chapters 6131 through 6141, to be in violation of the Fourteenth Amendment to the U.S. Constitution, and as such are unconstitutional.

4. Issue a temporary restraining order pursuant to FRCP 65, ordering defendants and their officers, agents, and employees, and all those in active concort or participation with them to refrain immediately and pending the final hearing and determination of this action from foreclosing on Plaintiff's property.

5. Issue a permanent injunction perpetually enjoining and restraining defendants their officers, agents, employees, successors and attorneys and all those in active concert or participation from collecting taxes on land that is used for farm purposes on any other basis than the Current Agricultural Use Value so long as the State adopts and uses such system for taxing farm land.

6. Issue a permanent injunction perpetually enjoining and restraining defendants their officers, agents, employees, successors and attorneys, and all those in active concert or participation with them from collecting special assessments under the Ohio 'Ditch laws - Chapters 6131 through 6141 of the Ohio Revised Code.

7. Allow Plaintiff his costs,

herein, including reasonable attorney's fees, and such other relief as may appear to the court to be just and equitable.

(Complaint, prayer for relief.)

Plaintiff in Case No. 3:89CV7251 in substance claims that he received no benefit from ditch work done in Sandusky County for which he was assessed, that Ohio Rev. Code 6131-6141 is unconstitutional, that there is a taking of private property without due process. Plaintiff also contends in Case No. 3:89CV7251 that defendants have valued his farmland in an unconstitutional manner, pursuant to Ohio Rev. Code 5713.30-5713.38. Plaintiff asks that the statutes be declared unconstitutional and that the collection of any taxes and assessments be enjoined. Case No. 3:89CV7251 was by Judge McQuade, prior to his resignation, consolidated with

3:89CV7102 and transferred to this Court.

The two causes of action have spawned innumerable motions and briefs. Fulton County officials have not proceeded with Ditch Project 2036 and there is a state court action pending wherein one of the plaintiffs in Case No. 3:89CV7102 is a plaintiff.

In Sandusky County there is an action to foreclose to collect taxes and assessments due and owing from plaintiff Hickey. The Sandusky action is proceeding, and that court has set that case for a pretrial conference. Plaintiff Hickey asked this Court on February 5, 1990 to issue a preliminary restraining order to restrain defendants Sandusky County Commissioners, Treasurer Auditor & attorneys from proceeding with the foreclosure action. The Court has conducted an oral hearing on the

motions and one for the preliminary injunctions.

County defendants inter alia would like this Court to make a substantive decision that the Ohio Statutes involved are constitutional and that no federal rights have been violated.

This Court, being one of limited jurisdiction, must first determine if in fact it may make a substantive decision. If the Court does not have jurisdiction, it may proceed no further.

The Tax Injunction Act, 28 USC 1341 is as follows: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

As set forth in 17 Wright, Miller & Cooper, Fed. Prac. & Proc. 4237:

A state remedy either in law or

> in equity will, if it is plain, speedy, and efficient, suffice to defeat jurisdiction, as will a state declaratory judgment action. The holding that only minimum procedural criteria need be met lends support to the many cases that have held that the state remedy, to satisfy this section, need not necessarily be the best remedy available or even equal to or better than the remedy that might be available in federal court.

This legislation is meant to drastically reduce federal court jurisdiction to interfere with local collection of taxes. See also Wright v. McClain, 835 F.2d 143 (6th Cir. 1987) as follows:

> The Tax Injunction Act is an expression of congressional purpose to promote comity and to afford states the broadest independence, consistent with the federal constitution, in the administration of their affairs, particularly revenue raising.

Id. at 144. See also, In re Gillis, 836 F.2d 1001 (6th Cir. 1988).

The case of California v. Grace Brethren Church, 457 U.S. 393 (1982),

is dispositive. Pertinent sections of this opinion are quoted below:

> It is plain from this language that the Tax Injunction Act prohibits a federal district court, in most circumstance, from issuing an injunction enjoining the collection of state taxes. Although this court once reserved the question, we now conclude that the Act also prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional.
>
> ...
>
> Consequently, because Congress' intent in enacting the Tax Injunction Act was to prevent federal-court interference with the assessment and collection of state taxes, we hold that the Act prohibits declaratory as well as injunctive relief. Accordingly, the District Court in these cases was without jurisdiction to declare the California tax provision unconstitutional or to issue its injunction against state authorities unless the appellees had no "plain, speedy and efficinent remedy" in the state courts.

Id. at 408-11.

Plaintiffs have contended that since they have asked that the various Ohio statutes be declared unconstitutional, 28 U.S.C.1341 is not applicable. This

contention is clearly opposed to the holding in California v. Grace Brethren Church. See also In re Gillis, 836 F.2d 1001.

Even if 28 U.S.C. 1341 was not applicable, this Court should refrain from acting on the grounds of comity. See In re Gillis, 836 F.2d at 1005 as follows:

> Although the Tax Injunction Act may not be applicable, we connot ignore the policies underlying the Act. "[E]ven where the Tax Injunction Act would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief." Rosewell, 450 U.S. at 525 n.33, 101 S.Ct. at 1235 n. 33. Thus, even if the facts of a state tax matter do not technically fit within the language of 1341, the federal courts should restrain from interfering in the state proceedings. Alcan Aluminum v. Department of Revenue, 724 F.2d 1294 (7th Cir. 1984).

The issue then becomes whether or not the state has provided "a plain, speedy and efficient remedy." This

is the test both for the application of 28 U.S.C.1341 or restraint under the principle of comity.

Plaintiffs suggest that when 28 U.S.C.1331 was amended to remove the monetary amount necessary for this Court to have original jurisdiction over federal questions that the state courts lost concurrent jurisdiction where appropriate over federal questions. Section 1331 of 28 U.S.C. now reads as follows: "The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States."

The amendment to 28 U.S.C.1331 broadens federal court jurisdiction but it did not limit state court concurrent jurisdiction. See 13B Wright, Miller & Cooper, Fed. Prac. & Proc. 3561.1 (2d ed. 1984); cf Chivas

Products, Ltd. v. Owen, 864 F.2d 1280 (6th Cir. 1988), overruled on other grounds, 58 U.S.L.W. 4157, 4160 (1990). Plaintiffs' contention is not well taken.

Another preliminary matter is the determination of whether or not a ditch assessment is a tax under the statute. It clearly is. See 17 Wright, Miller & Cooper, Fed. Prac. & Proc. 4237 (2d ed. 1988) and cases cited therein. See also Lake Lansing Sp. A. Prot. Ass'n. v. Ingham v. Ingham Cty., etc., 488 F. Supp. 767 (W.D. Mich. S.D. 1980); Group Assisting Sewer v. City of Ansonia, 448 F. Supp. 45 (D. Conn. 1978).

Coming to the question of whether the state has provided a plain, speedy and efficient remedy, the Supreme Court in California v. Grace Brethren Church, 457 U.S. at 441 held as follows:

Last Term, in Rosewell v. La Salle National Bank, this Court had occasion to consider the meaning of the "plain, speedy and efficient" exception in the Tax Injunction Act. After reviewing previous decisions and the legislative history of the Act, the Court concluded that the "plain, speedy and efficient" exception requires the "state-court remedy [to meet] certain minimal procedural criteria." 450 U.S., at 512 (emphasis in original). In particular, a state-court remedy is "plain, speedy and efficient "only if it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." Id., at 514 (quoting La Salle National Bank County of Cook 57 Ill. 2d318, 324, 312 N.E. 2d 252, 255-256 (1974)). Applying these considerations, the Rosewell Court held that an Illinois tax scheme, requiring the taxpayer to pay an allegedly unconstitutional tax and seek a refund through state administrative and judicial procedures, was a "plain, speedy and efficient remedy" within the meaning of the tax Injunction Act. In reaching this holding, the Court specifically relied on legislative Reports demonstrating congressional awareness that refunds were the exclusive remedy in many state tax systems.

The holding in Rosewell reflects not only Congress' express command in the Tax Injunction Act, but also the historical reluctance of the

> federal courts to interfere with the operation of state tax systems if the taxpayer had available an adequate remedy in the state courts.

The court went on to say that it must construe narrowly the "plain, speedy and efficient" exception to the Tax Injunction Act. The court noted that state court rulings might ultimately be reviewed in that court.

Turning now to the remedies provided by statute the Court quotes, with approval, the following from defendants Sommer and Limbach's motion for judgment on the pleadings:

> With respect to plaintiff's claim on the ditch assessment, Ohio Revised Code Section 6131.15 provides that the County engineer shall prepare a schedule of benefits and assessments. Section 6131.16 requires notice of a final hearing before the board of county commissioners to be given to all the owners whose names appear in the engineer's schedules of assessments and damages. Any owner may then file exceptions to the engineer's schedules with the board of county commissioners. Id 6131.17. A final hearing is held

at which the board must hear any evidence offered for or against the asessment proposed to be levied against any owner. Id. 6131.22. Ohio Revised Code Section 6131.25 provides that any affected owner may appeal an order of the board of county commissioners to the court of common pleas. In this appeal the affected owner can raise any constitutional claims. See in re Morrison Single county Ditch No. 1330, 20 Ohio St. 3d 13 (1985).

As to Case No. 3:89CV7251 and plaintiff's challenge to the valuation and assessment of his real estate for tax purposes, plaintiff has a plain, speedy and efficient remedy under Chapters 5715 and 5717 of the Ohio Revised Code. See Iris Sales Co. v. Voinovich 43 Ohio App. 2d 18 (Ct. of App. Cuyahoga Cty. 1975), as follows:

> The existence of a special statutory procedure for the correction of any inequalities in real property taxation rates makes declaratory relief particularly inappropriate in the case at bar.
>
> Plaintiff's declaratory judgment action essentially seeks two declarations:
>
> (1) that a discriminatory classification of real property

for tax purposes has been maintained by defendants;

(2) that said discriminatory classification is illegal and unconstitutional.

If such a discriminatory classification of real estate for tax purposes is maintained by defendants, a judgment declaring this discriminatory classification illegal and unconstitutional is unnecessary. Ample statutory and case law already exists on this subject. The second and third syllabi of State, ex rel. Park Invest. Co., v. Bd. of Tax appeals (1971), 26 Ohio St. 2d 161, read as follows:

"2. The Board of Tax Appeals has the mandatory duty, in the exercise of its supervisory power and duty, pursuant to R.C.5715.01, to take such steps as are necessary to effect an orderly correction of any inequalities in the percentage of true value at which all real property and all classes thereof are assessed for taxation. (R.C. 5715.011, effective May 14, 1969.)

"3. Action taken pursuant to the mandatory provisions of R.C. 5715.01 and 5715.011 must carry out the constitutional command, set forth in Section 2 of Article XII of the Ohio Constitution, that 'land and improvements thereon shall be taxed by uniform rule according to value,' and the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

Id. at 20-21.

It may be that some of the remedies outlined above may no longer be available to plaintiffs. However, a plaintiff cannot finesse or forward fumble his way into federal court. See 17 Wright, Miller & Cooper, Fed. Prac. & Proc. 4237 (2d ed. 1988):

> If the state has made available a suitable remedy, that defeats federal jurisdiction even though the taxpayer has failed to take advantage of it and it is too late now to do so. A state remedy will bar relief even though the highest state court has previously rejected the constitutional challenge the taxpayer wishes to raise. All grounds must be raised in the state action. A plaintiff cannot reserve for decision by a federal court the federal grounds for the challenge.

The court finds that it does not have jurisdiction over the causes of action set forth in either complaint, and the complaints must be dismissed. See Fed. R.. Civ. P. 12(b)(1). Since the various motions including the motions for preliminary injunction

are appendages to the complaints, they fall with the complaints and require no ruling by this Court except for defendant Fulton County's motion for sanctions. The Court finds that plaintiffs have not violated Fed. R. Civ. P. 11.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED this case be, and hereby is, DISMISSED; and it is

FURTHER ORDERED that defendant Fulton County's motion for sanctions be, and hereby is, DENIED.

Sgn John H. Potter

United States District Judge

Filed
1990 Mar. 7
Clerk

UNITED STATES DISTRICT COURT

Northern DISTRICT OF

Ohio, Western Division

Gahlon W. Kunkle, et al.

v. JUDGMENT IN A

CIVIL CASE

Fulton County Board of

Commissioners et al.

CASE NUMBER

C 89-7102

IT IS ORDERED AND ADJUDGED that this case is dismissed; defendant Fulton County's motion for sanctions is denied.

John W. Potter
Judge

March 7, 1990 James S. Gallas
Clerk

by Barbara J. Pompos
Deputy Clerk